



Montana Board of Oil and Gas Conservation  
2535 St. Johns Avenue  
Billings, MT 59102  
*Via Email to [mtogpub@mt.gov](mailto:mtogpub@mt.gov)*

October 24, 2017

Re: Hydraulic Fracturing Rulemaking – Ensuring Timely Public Disclosure of Hydraulic Fracturing Chemical Information

To the Members of the Montana Board of Oil and Gas Conservation:

Please accept the following comments concerning the Board's upcoming hydraulic fracturing rulemaking. These comments are submitted on behalf of the Montana Environmental Information Center, Natural Resources Defense Council, Bonnie and Jack Martinell, Dr. David Lehnherr, David Katz, Anne Moses, Dr. Mary Anne Mercer, and Dr. Willis Weight.

As the Board is aware, the Legislature this year enacted SB 299, which requires oil and gas operators seeking an exemption from the Board's fracking chemical disclosure rules for alleged trade secret information to justify their trade secret claims and charges the Board's Administrator with determining the validity of those claims before granting an exemption from disclosure requirements. SB 299 has the potential to close a major loophole in Montana's fracking chemical disclosure framework by ensuring that only legitimate trade secret information is shielded from the public. Realizing the promise of this new legislation will require probing review of trade secret claims by the Board's Administrator. Further, to give real meaning to the Legislature's new mandate for expanded public access to fracking chemical information, it is imperative that the Board adopt rules to ensure the public has access to that information when they need it most—before fracking occurs.

To that end, as part of its upcoming rulemaking to implement SB 299, we urge the Board to establish a regulatory requirement that oil and gas operators must publicly disclose the specific chemical ingredients of the hydraulic fracturing fluids they plan to use to complete a well in our state before the hydraulic fracturing operation occurs. As we have explained in prior submissions to the Board, requiring operators to disclose the specific chemical ingredients of their fracking fluids before fracking occurs is essential to protect the interests of Montana's

landowners and the broader public.<sup>1</sup> It is widely accepted that landowners should take action to protect their interests by conducting baseline testing of water supplies on their property before fracking occurs in their area.<sup>2</sup> But landowners cannot carry out effective baseline testing without knowledge of the specific chemicals planned for use in nearby fracking operations.<sup>3</sup> Further, individuals living or working near planned fracking operations require access to specific fracking fluid chemical information before fracking occurs to investigate the potential risks those operations may pose to their health, property, and the environment.<sup>4</sup>

The Board's current rules, however, do not require operators to disclose the specific chemical ingredients of their fracking fluids before fracking occurs. Instead, the rules require pre-fracking disclosure of only general information about fracking fluid ingredients, namely, "the trade name or generic name of the principle [sic] components or chemicals" in the fluid proposed for use.<sup>5</sup> To satisfy this requirement, operators are not required to disclose the individual chemical ingredients of the various additives proposed for use or provide their unique Chemical Abstract Service (CAS) numbers.<sup>6</sup> Thus, as we have pointed out in prior submissions

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<sup>1</sup> See *In re* Amendment of Regulations Governing Disclosure of Well Stimulation Fluids and Proprietary Chemicals and Trade Secrets, ARM §§ 36.22.608, 36.22.1015-36.22.1016, Rulemaking Petition (July 25, 2016) (attached as Exhibit 1); Comments of Katherine O'Brien Re: Petition for Rulemaking (Sept. 21, 2016) (attached as Exhibit 2); Comments of Bonnie Martinell in support of fracking chemical disclosure rulemaking petition (attached as Exhibit 3); Comments of David Lehnher (attached as Exhibit 4); Comments of Lori G. Byron, MD, FAAP, Re: Improving Public Access to Fracking Chemical Info. (Sept. 19, 2016) (attached as Exhibit 5); Testimony of Mary Anne Mercer In support of fracking chemical disclosure petition (attached as Exhibit 6); Comments of Willis D. Weight, PhD PE, Re: Improving Public Access to Fracking Chemical Info. (attached as Exhibit 7).

<sup>2</sup> See, e.g., Groundwater Prot. Council, FracFocus, Groundwater Quality & Testing, <https://fracfocus.org/groundwater-protection/groundwater-quality-testing> (last visited October 23, 2017) (stating that American Petroleum Institute guidance recommends baseline water quality testing before fracking begins in a new area and affirming that landowners should conduct testing to establish a water quality baseline for post-fracking analysis).

<sup>3</sup> See Hertha L. Lund, Willis Weight, and Dennis R. Lopach, *Fracking in Montana: Asking Questions, Finding Answers*, at 51 (Dec. 2015) (attached as Exhibit 8) (recommending that surface owners establish a water quality baseline before fracking occurs, but noting that "it is impossible for [landowners] to do accurate baseline testing for potential contaminants" without access to the specific chemical ingredients of the fracking fluid mixture used in their area).

<sup>4</sup> With this letter, the commenters are re-submitting a selection of peer-reviewed scientific studies documenting the human health threats posed by fracking chemicals and the potential for exposure to those chemicals through drinking water and other media, which we initially provided to the Board with our July 2016 rulemaking petition (see attached Exhibits 9-20), and the additional article Christopher D. Kassotis, et al., *Adverse Reproductive and Developmental Health Outcomes Following Prenatal Exposure to a Hydraulic Fracturing Chemical Mixture in Female C57Bl/6 Mice*. *Endocrinology*, Vol. 157, Issue 9 (Sept. 1, 2016) (attached as Exhibit 21).

<sup>5</sup> ARM 36.22.608(3).

<sup>6</sup> See *id.*

to the Board, pre-fracking disclosures under the Board's current rules often consist merely of a list of additive types (e.g., friction reducer, crosslinker, breaker, biocide) with the additive product names sometimes included.<sup>7</sup> These lists do not identify specific chemical constituents for which a landowner could conduct baseline water quality testing and they do not enable members of the public to investigate the risks to human health or the environment posed by specific chemicals that will be used in their area. Further undermining the utility of pre-fracking disclosures under the Board's current rules, operators are not required to disclose even generic fluid information for the specific fracking job for which they seek authorization; instead, operators may submit "a copy of a final design of well treatment actually used for similar wells and which reflects the likely design for the well to be permitted" or "a pre-filed generic design submitted for specific geologic formations, geographic areas, or well types likely to be used in a particular well."<sup>8</sup> Moreover, "[f]or wildcat or exploratory wells or when the operator is unable to determine that hydraulic fracturing, acidizing, or other chemical treatment will be done to complete the well," the operator may defer any chemical disclosure until just 48 hours before fracking begins,<sup>9</sup> which is far too late for the public to make use of chemical information for water testing and other investigation. In short, the current rules fail to provide timely public access to the chemical information that landowners and others need to protect their interests.

To remedy this fundamental flaw in the existing disclosure framework, we urge the Board to adopt a regulatory requirement that operators disclose to the Board and the public the chemical ingredient name and CAS number for all fracking fluid ingredients—subject to the trade secret exemptions provided by the Board's rules and SB 299—as part of the operator's permit application. The Board should mandate that the required chemical information be provided to the Board and made accessible to the public online at least 45 days before fracking occurs so landowners have a reasonable opportunity to use the information for baseline water quality testing and other appropriate investigations. For the Board's convenience, a markup of the current version of ARM 36.22.608 showing our proposed changes is attached as Exhibit 23.

Importantly, there can be no argument that the proposed requirement for pre-fracking disclosure of specific fluid ingredients is impracticable, as Wyoming has implemented this very requirement for several years.<sup>10</sup> Indeed, we are aware of at least one operator in Montana that has voluntarily disclosed to the Board a complete list of fracking fluid ingredients and CAS numbers with their permit application.<sup>11</sup> Given the public's demonstrated need for chemical-specific pre-fracking disclosure and industry's demonstrated ability to comply, the Board should utilize the opportunity afforded by its upcoming rulemaking to remedy this deficiency in its existing regulations.

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<sup>7</sup> See sample disclosures attached as Exhibit 22.

<sup>8</sup> ARM 36.22.608(4).

<sup>9</sup> ARM 36.22.608(2).

<sup>10</sup> Wyo. Admin. Code OIL GEN Ch. 3, § 45(a), (d). If the composition of the fluid used ultimately differs from what was disclosed in the pre-fracking submission, Wyoming's rules simply require that the operator submit an updated disclosure with their well completion report. See id. § 45(h)(ii).

<sup>11</sup> See sample disclosure attached as Exhibit 24.

In closing, we appreciate this opportunity to comment on necessary reforms of the Board's fracking chemical disclosure rules and we urge the Board to make the requested changes as part of its forthcoming rulemaking to implement SB 299. Should you have any questions about these comments, please contact the undersigned at the number below.

Sincerely,

A handwritten signature in blue ink, appearing to read "Katherine O'Brien", is positioned above the printed name.

Katherine O'Brien  
Earthjustice  
313 East Main Street  
Bozeman, MT 59715  
(406) 586-9699  
kobrien@earthjustice.org

*Counsel for Montana Environmental  
Information Center, Natural Resources  
Defense Council, Bonnie and Jack Martinell,  
Dr. David Lehnherr, David Katz, Anne Moses,  
Dr. Mary Anne Mercer, and Dr. Willis Weight*